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No. 287

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

ERWIN P. WERNER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Erwin P. Werner, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit of the United States of America to review and reverse the decision and judgment of that court regarding a wartime leasehold by the government of land owned by petitioner.

OPINION BELOW

Werner v. United States, 233 Fed. 2d 52.

Opinion of the District Court is not in official reports but is printed in the record below, page 37-44.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254 (1) of U. S. Codes. The judgment and decision of the Court of Appeals was rendered March 31, 1956. Application to extend the time within which to file a Petition for Certiorari was granted by Mr. Justice Burton and extended to July 28, 1956. The Petition for Certiorari was filed within the time thus allowed.

CONSTITUTIONAL PROVISION

Fifth Amendment U. S. Constitution:

". . . Nor shall private property be taken for public use without just compensation."

STATUTES AND PROCLAMATIONS INVOLVED

Proclamation 2487

Proclamation 2487 provides as follows:

"Presidential Proclamation 2487 of May 21, 1941, 6 F. R. 2617, 55 Stat. 1647, 50 App. U.S.C. Note prec. sec. 1, p. 5636, is as follows:

Proclaiming That an Unlimited National Emergency Confronts This Country, Which Requires That Its Military, Naval, Air and Civilian Defenses Be Put on the Basis of Readiness to Repel Any and All Acts or Threats of Agression Directed Toward Any Part of the Western Hemisphere

By the President of the United States of America

A Proclamation

Whereas on September 8, 1939, because of the outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures 'for the purpose of strengthening our national defense within the limits of peacetime authorizations'.

Whereas a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a world-wide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, and

Whereas indifference on the part of the United States to the increasing menace would be perilous and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as well as to repel the threat of [18] predatory incursion by foreign agents into our territory and society,

Now, Therefore, I, Franklin D. Roosevelt, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprise possible may survive.

I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or capital.

I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this twenty-seventh day of May, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one-hundred and sixty-fifth.

(Seal) FRANKLIN D. ROOSEVELT."

(R. 23-25, Exhibit C)

The Joint Resolution of July 25th, 1947 of Congress provides as follows:

"80th Congress, 1st Session, Ch. 327—July 25, 1947.

JOINT RESOLUTION

To Terminate Certain Emergency and War Powers.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the following statutory provisions are hereby repealed:

. . .

Sec. 3. In the interpretation of the following provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

Title 50, Section 171, U. S. Code, Section 3

Title 50, Section 171, U. S. Code, Section 3, provides as follows:

171. Acquisition of lands; authority of Secretary of the Army; condemnation, purchase, and donation; emergency provisions.

The Secretary of Army may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works

for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operation of such plants. Such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted:

Provided, that when the owner of such land interest or rights pertaining thereto shall fix a price for the same which in the opinion of the Secretary of the Army shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay;

Provided, further, that the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above mentioned purposes;

And provided, further, that when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof, or other interest therein, right pertaining thereto be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes. (Aug. 18, 1890, ch. 797; 26 Stat. 316; July 2, 1917, ch. 35, 40 Stat. 241; April 1, 1918, ch. 54, 40 Stat. 518, July 26, 1947, ch. 343, Title II; par. 205 (a), 61 Stat. 501.)

Proclamation of the President of April 28, 1952

The Proclamation of the President of April 28, 1952 provides as follows:

TITLE 3 — THE PRESIDENT
PROCLAMATION 2974
TERMINATION OF THE NATIONAL EMERGENCY
PROCLAIMED ON SEPTEMBER 8, 1939 AND MAY 27, 1941

By the President of the United States of America
A PROCLAMATION

WHEREAS by Proclamation No. 2352 of September 8, 1939, the President proclaimed the existence of a national emergency in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States of America and the strengthening of our national defense within the limits of peace-time authorizations; and

WHEREAS by Proclamation No. 2487 of May 27, 1941, the President proclaimed the existence of an unlimited national emergency, requiring that the military, naval, air and civilian defenses of this country be put on the basis of readiness to repel any and all acts or threat of aggression directed toward any part of the Western Hemisphere; and

WHEREAS acts of aggression against the United States of America by Axis Powers subsequently led to declarations by the Congress of the existence of states of war between the United States of America and Japan, Germany, Italy, Hungary, Rumania and Bulgaria; and

WHEREAS the state of war between the United States of America and Japan, which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951;

NOW THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day upon the entry into force of the Treaty of Peace with Japan.

Nothing in this Proclamation shall be construed to affect Proclamation No. 2914, issued by the President on December 16, 1950, declaring that world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world, and proclaiming the existence of a national emergency requiring that the military, naval, air and civil defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace; and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act, approved April 14, 1952 (Public Law 313—82d Congress), for the purpose of continuing the use of property held under the Act of October 14, 1940, ch. 862, 54 Stat. 1125, as amended,

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this twenty-eighth day of April in the year of our Lord nineteen hundred and fifty-two, and of the Independence of the United States of America the one hundred and seventy-sixth.

HARRY S. TRUMAN

By the President:
Dean Acheson,
Secretary of State.

Civil Code Section 716:

"Rule against perpetuities; vesting of future interests.

"Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included in determining the existence of a suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the rule against perpetutities. (Enacted 1872. As amended Stats. 1951, c. 1463, p. 34432, §4.)"

Civil Code Section 717:

"Leases of agricultural land; duration.

"No lease or grant of land for agricultural or horticultural purposes for a longer period than fifteen years, in which shall be reserved any rent or service of any kind, shall be valid; provided, that any land of a municipality used for agricultural or horticultural purposes and upon which is discharged sewage or waste water may be leased for a period not exceeding twenty-five years. (Enacted 1872. As amended Stats. 1895, c. 82, p. 75, §1; Stats. 1909, c. 662, p. 1000, §1; Stats. 1915, c. 176, p. 349, §1.)"

QUESTIONS RAISED

(1) Whether the Joint Resolution of Congress of July 25, 1947, Public Law 239, terminated the National Emergency as proclaimed by the President on September 8, 1939 and continued on May 27, 1941.

(2) Whether the plaintiff, by reason thereof, is entitled to rent from the date of the termination of the national emergency as declared by the Act of Congress, on land which he and his wife owned in Riverside County, California, and for which there was a lease which extended only six months beyond the unlimited national emergency as declared by the President in his proclamation of May 27, 1941—Proclamation 2487.

(3) Whether the lease contract of plaintiff expired July 25, 1947 and plaintiff is therefore entitled to recover for occupancy and use of land from six months thereafter under the Fifth Amendment U. S. Constitution.

(4) Whether the lease contract of the Government was void under California law in violation of the rule against perpetuities.

(5) Whether the lease violates California Civil Code sections 716 and 717 and whether a Government lease is governed by the law of the state in which the lease is made. *(Erie v. Tompkins.)*

(6) Whether the retention of the property by the Government beyond the period of the national emergency constitutes taking of property without due process of law and without paying its fair market value —"just compensation" as required by the Fifth Amendment to the Constitution of the United States.

STATEMENT OF FACTS

The plaintiff in this action owns forty acres of land near March Field Air Base in Riverside County, California. The property was occupied by the United States for war purposes and its original owners Markwell Herron and Barbara Herron, his wife, agreed to rent the land for $25 per year (62½ cents per acre per year or a little over 5 cents an acre per month). The original lease was for five months ending June 30, 1943.

The lease contained the following clause:

> "This lease may, at the option of the Government, be renewed from year to year at a rental of $25.00 per year, and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least 30 days before this lease or any renewal thereof would otherwise

expire: Provided that no renewal thereof shall extend the period of occupancy of the premises beyond six months from date of the termination of the unlimited national emergency as declared by the President of the United States on May 27, 1941." Proclamation 2487.

The Government continued to occupy the premises and to renew the lease from year to year. On May 17, 1948, Mr. and Mrs. Herron sold and transferred and deeded the property covered by the lease to the plaintiff. The Government still continued to occupy the premises. It is a matter of common knowledge that the war with Germany had ended on May 7, 1945, and the war with Japan had ended August 14, 1945. The Eightieth Congress First Session, Chapter 327, in Public Law 239, dated July 25, 1947, held that the National Emergency was terminated. Petitioner contends that the lease by the Government was thereby terminated by the joint resolution of Congress on July 25, 1947.

Plaintiff then brought this action for money and for use and occupancy of the land and for declaratory relief.

In the trial court the plaintiff contended that the lease in question was was acquired under the authority of Title 50, Section 171, U.S. Code, and that this act was specifically mentioned in Section 3 of the Act of July 25, 1947, as amended, terminating the powers granted throughout the national emergency. On the other hand, the Government contended that the National Emergency was not terminated by the joint reso-

lution of Congress but terminated by an official proclamation by the President on April 28, 1952.

The trial court held that the National Emergency proclaimed by the President could not be terminated by Congress and therefore until the President himself issued a proclamation terminating the National Emergency the act of Congress terminating it had no effect (R. 44). As a result he made findings of fact and conclusions of law denying the plaintiff any rentals other than that nominal account provided in the lease—$25.00 per year—and holding that there was a valid subsisting statutory authority authorizing the continuation of the lease and also authorizing the acquisition of the property other than under the provisions of Section 50 U.S.C.A. 171. (R. 45-47.) The Court further held that the plaintiff was only entitled to recover $25 per year for the period from June 30, 1945, to October 28, 1952, without interest, and that he be taxed costs. (R. 49.)

In the Court of Appeals that court raised *sui sponti* the issue of whether the lease itself was ever a valid one since by its terms it offended the California laws against perpetuities, California Constitution and Sections 715, 716, 717, California Civil Code.

The Court of Appeals, however, decided that "even if the lease should violate the rule against perpetuities in California, it is probably not the sort of agreement so shocking to the conscience that an appellate court, *sua sponte*, should strike it down."

The Court did comment, however, that "there is the possibility of great inequity when the Government attempts to condemn a leasehold on the terms of Werner's lease. The Government, for a nominal consideration, takes the property on a basis of practically neutralizing its value. The fee may become virtually unmarketable."

Petitioner here contends that this is violative of the provisions of the Fifth Amendment to the Constitution of the United States that provides "Nor shall private property be taken for public use without just compensation."

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to determine important questions of the powers of the President and of Congress, also whether the Government in making a lease, is bound by the law of the State where made and its rule against perpetuities, and also what is a fair construction of the Fifth Amendment to the Constitution of the United States in relation to leaseholds, and whether the Government's action in this case amounts to confiscation and taking of property without just compensation in violation of the Fifth Amendment U. S. Constitution.

I.

THIS COURT SHOULD DECIDE AN IMPORTANT QUESTION OF THE RIGHT OF THE LEGISLATIVE BRANCH TO TERMINATE AN EMERGENCY PROCLAIMED BY THE EXECUTIVE.

1. The District Court erred in holding that the National Emergency was not terminated as of July 25, 1947, and that the joint resolution of Congress of July 25, 1947, did not have that effect, and did not terminate the lease.

The Trial Court held that since the National Emergency was proclaimed by the President it could only be terminated by the President. (R. 41.) This was erroneous. The joint resolution of Congress specifically mentioned the proclamations by the President including the one in 1941 referred to in the lease (Proclamation 2487). The Court of Appeals affirmed.

Both courts misconceived the authority from which the President may proclaim a state of emergency or any other proclamation.

It is the Congress which vests the power in the President.

In 65 C.J., p. 1271, Sec. 52(b), Proclamations and Orders are defined as follows:

> "A proclamation by the President is his official and public announcement of an order. No particular form of such announcement is necessary. The President may issue proclamations when he thinks it is proper to give notice or information to the

public, but it has been said that they have no effect as law in the absence of constitutional or congressional authorization."

Bouvier's Law Dictionary defines *proclamation*,

"the act of proclaiming or making publicly known certain affairs of state. A written or printed document in which are contained such matters, issued by proper authority; as the President's proclamation, the governor's, the mayor's proclamation.

"The President's proclamation may give force to a law, when authorized by Congress; as, if Congress were to pass an act which should take effect upon the happening of a continent event which was to be declared by the President by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then it wanted."

"On the breaking out of war it is usual for a nation to issue a proclamation announcing the existence of hostilities. SEE MANIFESTO; WAR."

The President cannot create an emergency. He merely proclaims its existence. Without some connection with power granted by the Constitution or Congress it is without legal significance. To give it proclamation power the power of the lower court attached to it would be to give it legislative power. Therefore, it would be unconstitutional. A proclamation is just what the word means, to proclaim.

But here we were not concerned with the proclamation except that it established as a matter of public notice that a national emergency existed and gave

notice or information to the public as to when that became effective. (65 C.J. 1271, Sec. 32). The termination of that emergency could be declared by the joint resolution or acts of Congress, as it was in this case on July 25, 1947.

The court below confused the termination of the national emergency with the proclamation regarding its termination, or the official declaration of termination.

The lease itself provided that in no event shall the lease extend more than six months after termination of the unlimited emergency. It is possible that Congress, as representing the different agencies of Government can determine by its statute the termination of the unlimited emergency so as to release the Government from the obligations of its contracts.

Assume now that the Government had sought to terminate the contract in *toto*, could it be said that the Act of Congress did not do so under the provisions of the lease. If then the shoe fits on the other foot, should it not be held that the lease terminated.

Here, the lease was entered into at a price that was practically nothing. Obviously the owners of the land were patriotic and wanted to help the Government, but patriotism should not be turned into forfeiture or a penalty.

The court below therefore erred in its construction of the law and the judgments below should be reversed and the Government ordered to pay to the petitioner the fair market value of the leasehold from six months after July 25, 1947.

II.

THE COURT SHOULD DECIDE AN IMPORTANT QUESTION OF THE APPLICATION OF STATE LAW TO GOVERNMENT LEASES.

The court below erred in holding that the lease was not void as offending against perpetuities under the California Constitution and Statutes.

The lease was entered into in California under California law. That law was construed by the State of California to provide that in California there is a rule against restraints on alienation with its statutory period of being or twenty-five years, and the rule against remoteness of vesting with its common law period of liaison being end twenty-one years."

Estate of Sahlender, 89 Cal. App. 2d, 329; 201 Pac. 2d 69.

See Perpetuities and Restraints: *The Needed Reform*, by Henry Coil, 30 Cal. Bar Journal 83;

And the leading case in California.

Estate of Walkerley, 108 Cal. 627; 41 Pac. 772.

And *United States v. Baumann*, 56 F. 2d 109.

The Government has contended in the Court of Appeals that the Government was exempt from the rule against perpetuities or restraints. It contended that Federal law controls contracts of the United States. This, however, ignores the rule that where the Government is dealing with private parties in a state that the laws of the State with relation to their con-

tracts govern, at least in this case, and the taking by the Government beyond the date set by Congress constitutes the taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

III.

THIS COURT SHOULD DECIDE WHETHER THE FIFTH AMENDMENT PROTECTS TAKING OF PROPERTY BY LEASEHOLDS WITHOUT JUST COMPENSATION.

The Fifth Amendment provides, "Nor shall private property be taken for public use without just compensation".

It is obvious that the taking of the petitioner's land at only a little more than 5 cents per acre per month, or 62½ cents per acre per year was a taking without just compensation. In arguing against the rule of perpetuities in the Court of Appeals the Government said:

> "That leases of the Federal Government are exempt from this rule in any event is demonstrable in another way. The power of eminent domain inherent in the sovereign is inexhaustible, cannot be limited by contract, and may be exercised for any appropriate public purpose subject only to the requirement of compliance with the Fifth Amendment provision to pay just compensation: e.g.,
>
> *Berman v. Parker*, 348 U.S. 26, 33, 36 (1954); *United States v. Village of Highland Falls*, 154

F. 2d 224, 226; C.A. 2d 1946 (Certiorari Den.)
Volkinger v. United States, 329 U.S. 720."

We agree to that proposition, but it has not been applied in this case. Who can say that just compensation is being paid for land which an owner, patriotic, giving his all to help win a war, may allow the Government to use land in wartime for a nominal amount or even for nothing? Yet, when the war is over, he is entitled to its return, or for just compensation for the taking. Certainly it is obvious to this Court on its face that 62½ cents a year per acre for land in Riverside County, California, is not "just compensation". As the Court of Appeals pointed out, "there is the possibility of great inequity when the Government attempts to condemn a leasehold on the terms of Werner's lease. The Government, for a nominal consideration, takes the property on a basis of practically neutralizing its value. The fee may become virtually unmarketable."

The Fifth Amendment has provided for just compensation in that event. Surely the proof is clear that when Congress declared the unlimited national emergency over, that whatever statute or authority the Government acted under in entering the lease, that that lease was over and that if the Government decided a new lease or to take the land, it should have done so under the provisions of the Fifth Amendment to the Constitution of the United States and to give just com-

pensation to the owner. Evidence of the act of Congress of which the Court could take judicial notice was sufficient proof of the fact it was a legislative declaration of the termination of the National Emergency.

To allow the Government to continue in such a lease from year to year without paying for it except the nominal wartime sum of 62½ cents an acre per year was the taking of property without just compensation. The taking could be in the form of the perpetuation of the lease as well as condemnation proceedings actually to take the land.

We pray that this Court grant certiorari to resolve the important questions involved in this case and to hold that the lease of the Government was terminated six months after July 25, 1947; further (2) to hold that the Government never did have a valid subsisting lease; (3) to hold that the retention of the property by the Government throughout the period in which it held it was the taking of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States; further, that the case should be remanded to the District Court of the United Sates for the fixing of just compensation.

Respectfully submitted.

MORRIS LAVINE
Attorney for Petitioner.